UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HYUNDAI POWER TRANSFORMERS USA, INC.		
and	Cases	15-CA-230678 15-CA-240476
WILLIAM GIPSON, an Individual		
and		15-CA-231673
ASHLEE DISMUKES, an Individual		

COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STAY

Counsel for the Acting General Counsel, via the undersigned, hereby opposes the Motion to Dismiss or, in the Alternative, Motion to Stay (Motion) filed by Hyundai Power Transformers USA, Inc. (Respondent) (A copy of the Motion, exhibits deleted, is attached as Exhibit A.) General Counsel submits Respondent's arguments in support of the Motion to Dismiss and Motion to Stay are without merit and, accordingly, requests that the Motion be denied in its entirety.

Factual Background

On March 28, 2019, the General Counsel, by the Regional Director for Region 15, issued a Consolidated Complaint (Consolidated Complaint) in cases 15-CA-230678 and 15-CA-231673. The Consolidated Complaint included allegations that Respondent suspended and discharged Charging Party Ashlee Dismukes (Dismukes) in retaliation for her protected concerted activities, including providing deposition testimony in a lawsuit filed by Charging Party William Gipson

(Gipson) alleging employment discrimination by Respondent in violation of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq (1964). On August 30, 2019, the General Counsel, by the Regional Director for Region 15, issued an Order Further Consolidating Cases and Second Consolidated Complaint (Second Consolidated Complaint) adding case 15-CA-240476. (A copy of the Second Consolidated Complaint is attached as Exhibit B). The Second Consolidated Complaint added allegations that Respondent issued an unsatisfactory performance evaluation to and discharged Gipson in retaliation for his protected concerted activities, including making concerted complaints to Respondent about racial discrimination related to forced overtime and promotions in the workplace; filing charges with the Equal Employment Opportunity Commission (EEOC); and filing a lawsuit alleging discrimination by the Respondent in violation of the Civil Rights Act of 1964.

Argument

I. Respondent's Unfair Labor Practices, As Alleged in the Second Consolidated Complaint, Are Covered by the National Labor Relations Act.

Respondent, in its Motion, argues the Second Consolidated Complaint should be dismissed in its entirety because Gipson and Dismukes were not engaged in protected concerted activities within the meaning of Section 7 of the Act. Respondent asserts the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2017) supports its position that, because Section 7 of the Act does not reference employee complaints of discrimination or harassment or other conduct covered by Title VII of the Civil Rights Act of 1964 (Title VII), conduct protected under Title VII is not protected concerted activity within the meaning of Section 7 of the Act. The Supreme Court decision in *Epic Systems* is inapplicable, however, to the issues in this case. In *Epic Systems*, the Supreme Court considered whether the National Labor Relations Act (NLRA or the Act) preempted the Federal Arbitration Act, which predated the NLRA, to bar employers from

requiring employees to waive their right to class or collective actions as a condition of continued or future employment. *Id.* at 1619.

This case does not involve questions of preemption of federal law or waivers of terms and conditions of employment. Instead, the issue is whether actions of employees which are cognizable under Title VII may also constitute protected concerted activity within the meaning of Section 7 of the Act. The Board has held, to be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB 151, 152 (2014). Whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), *supplemented Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988). The Supreme Court has observed, however, that "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. at 835. The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The Board further states, under Section 7, both the concertedness element and the "mutual aid or protection" element are analyzed under an objective standard such that an employee's subjective motive for taking action is not

relevant to whether that action was concerted or for "mutual aid or protection." *Fresh and Easy Neighborhood Market*, 361 NLRB at 153.

The Board's decision in *Fresh and Easy Neighborhood Market* is instructive to this case as the Board found an employee was engaged in concerted activity for the purpose of "mutual aid and protection" when she sought the assistance of coworkers as witnesses in raising a complaint of sexual harassment against the employer. *Id.* at 153, 157. In this case, the Second Consolidated Complaint, at ¶7(a)-(c), alleges Gipson "concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees by complaining about racial discrimination in the workplace related to forced overtime and promotions," in addition to filing charges with the EEOC and a Title VII lawsuit in Federal District Court. The Second Consolidated Complaint further alleges, at ¶6(a), Dismukes "engaged in concerted activities with other employees for the purposes of mutual aid and protection, by giving testimony on behalf of employees who filed charges with the Equal Employment Opportunity Commission related to their employment relationship." Contrary to the assertions of Respondent, the Second Consolidated Complaint properly alleges that both Gipson and Dismukes engaged in protected concerted activity as defined in Section 7 of the Act irrespective of whether either employees' actions may be cognizable or actionable under Title VII. Thus, because the allegations of the Second Consolidated Complaint are legally sufficient to support the Complaint, Respondent's Motion to Dismiss should be denied.

II. Respondent's Motion to Stay These Proceedings Should Be Denied

Respondent also argues the Board should hold the Second Consolidated Complaint in abeyance while Title VII actions, filed separately by Charging Parties Gipson and Dismukes, are litigated in the Federal District Court for the Middle District of Alabama. Respondent argues the

allegations in the cases pending in Federal District Court filed by Gipson and Dismukes overlap with the allegations in the Second Consolidated Complaint as the underling facts are the substantially the same and the legal issues to be decided by the Federal District Court are similar, and, with regard to Gipson, encompass legal issues which are not before the Board. Respondent goes on to argue that, as discovery is ongoing in the Federal District Court cases filed by Gipson and Dismukes, a requirement that the parties proceed with litigating the allegations in the Second Consolidated Complaint could substantially impair the federal rights conferred on the parties as part of the District Court discovery process. Finally, Respondent argues decisions made by an Administrative Law Judge in a Board proceeding could have a preclusive effect on factual and legal issues pending before the Federal District Court.

The issues raised by Respondent concerning deferring or holding pending unfair labor practice charges or complaints in abeyance while closely related matters are pending before other governmental agencies is addressed in Board's Casehandling Manual at §10118.5(c). Pursuant to Casehandling Manual §10118.5(c), "The Regional Office may postpone making a determination of a ULP case where the outcome of a closely related matter pending before other Federal, State, or local Government agencies may significantly impact the disposition of the case to be deferred," and thus administrative deferral of ULP charges may be appropriate. This provision is supported by General Counsel Memorandum 80-31, Proposed Memorandum of Understanding with EEOC, dated June 24, 1980, which reads, "…Regions should continue to consider the deferral issue in all cases in which there is a case before the EEOC which presents issues that overlap the NLRA issue presented to us." Notably, GC Memo 80-31 reflects the General Counsel declined to enter into a Memorandum of Understanding with the EEOC concerning coordination of cases which present overlapping issues pending before both the EEOC and NLRB.

General Counsel further notes a concern to be addressed when considering whether deferral or abeyance of NLRB proceedings is appropriate is whether the Federal District Court hearing the Title VII retaliation claims filed by Gipson and Dismukes will apply a legal standard that is the same as, or different from or at odds with, the legal standard for liability under the Act. A review of the legal standard to be applied concerning the allegations included in both the Federal District Court Complaints and the Second Consolidated Complaint show the legal standards under Title VII and the NLRA are significantly different. Under *Wright Line*, 251 NLRB 1083 (1980), *enfd. on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982) and its progeny, the Board has fashioned a *motivating-factor* standard for causation, requiring General Counsel to establish that an employee's protected conduct was a motivating factor in an employer's decision to undertake the adverse action. In contrast, to establish liability for retaliation under Title VII, a complainant must prevail under a much more stringent *but-for* standard of causation. This standard requires a complainant to establish that their activities in furtherance of a Title VII claim were not merely a motivating factor for the retaliation, but that the retaliatory conduct would not have occurred in the absence of the Title VII activities. See *Univ. of TX Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). Thus, although the NLRA and Title VII claims may be based on the same facts, the district court under Title VII could dismiss under the more stringent but-for standard, while a Board Administrative Law Judge could find merit under the more lenient motivating-factor standard. Additionally, the elements of comity between federal agencies that underlie the Board's notions of deferral to the EEOC are not present here, where the EEOC has relinquished its interest in the cases filed by Gipson and Dismukes through issuance of right to sue letters.

Conclusion

For the reasons set forth above, the General Counsel respectfully requests that Respondent's Motion to Dismiss or, in the Alternative, Motion to Stay be denied.

Dated: February 22, 2021

/s/ William T. Hearne
William T. Hearne
Counsel for the Acting General Counsel
National Labor Relations Board
Region 15, Subregion 26
80 Monroe Avenue, Ste. 350
Memphis, TN 38103
Phone – (901) 425-7232
Email – william.hearne@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of General Counsel's Opposition to Respondent's Motion to Dismiss or, in the Alternative, Motion to Stay to be filed electronically with the National Labor Relations Board on February 22, 2021.

I further certify that on February 22, 2021, I caused a true and correct copy of General Counsel's Opposition to Respondent's Motion to Dismiss or, in the Alternative, Motion to Stay to be served via electronic mail upon the following persons:

Elizabeth B. Shirley
Burr & Forman LLP
420 North 20th St Suite 3400
Birmingham, AL 35203-5201
bshirley@burr.com

Jennifer M. Busby
Burr & Forman LLP
420 North 20th St Suite 3400
Birmingham, AL 35203-5201
gbusby@burr.com

Alicia K. Haynes, Esq.
Haynes & Haynes, P.C.
1600 Woodmere Drive
Birmingham, AL 35226
akhaynes@haynes-haynes.com

Heather N. Leonard, Esq.
PO Box 43768
2105 Devereaux Cir Ste 111
Birmingham, AL 35243-0768
heather@heatherleonardpc.com

Cynthia Wilkinson, Esquire
Wilkinson Law Firm PC
215 North Richard Arrington, Jr. Blvd.
Suite 301
Birmingham, AL 35203
wilkinsonfile@wilkinsonfirm.net

Dated: February 22, 2021

/s/ William T. Hearne

William T. Hearne
Counsel for the General Counsel

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

HYUNDAI POWER TRANSFORMERS USA, INC.	)	
and	)	**Cases 15-CA-230678**
	)	**15-CA-240476**
	)	**15-CA-231673**
WILLIAM GIPSON	)	
and	)	
ASHLEE SMITH DISMUKES	)	

RESPONDENT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO STAY AND BRIEF IN SUPPORT THEREOF

Respondent Hyundai Power Transformers USA, Inc. ("Respondent" or "HPT") moves to dismiss the Second Consolidated Complaint pursuant to the National Labor Relations Board Rules and Regulations §§ 102.24 and 102.50 or in the alternative to stay proceedings pending resolution of the pending federal litigation encompassing the same claims as the instant matter. In support thereof, HPT states as follows:

I. INTRODUCTION

Charging Parties William Gipson and Ashlee Smith Dismukes filed the NLRB Charges currently consolidated in this proceeding as a strategy to turn up the heat as much as possible against HPT and try to gain an advantage in currently pending litigation related to Charging Parties' employment with HPT – three (3) pending federal lawsuits, a total of seven (7) EEOC charges, not to mention the multitude of NLRB charges of which the Board

Exhibit A

is already aware. The heart of all of Charging Parties' disputes with HPT, however, are based in Title VII and § 1981. They are not proper complaints before the NLRB.[1].

General Counsel's Subpoena to HPT further demonstrates that the current proceedings before the NLRB run parallel to and are based on the same events and claims as the Charging Parties' on-going federal *employment* law actions. For example, the Subpoena requests **44 overly broad categories** of documents, many of them having nothing to do with timely alleged adverse actions pursuant to the NLRA. As set forth below, this matter is not properly before the Board and is due to be dismissed. Alternatively, the Board should defer to the jurisdiction of the District Court for the Middle District of Alabama and should stay this matter.

II. PROCEDURAL BACKGROUND

1. Charging Party William Gipson ("Gipson") filed his first EEOC Charge against HPT on August 11, 2016, alleging race discrimination and harassment under Title VII. Gipson filed a second EEOC Charge on December 5, 2016, again alleging race discrimination, harassment, and retaliation under Title VII. *See* Gipson EEOC Charges, attached as Exhibit 1.

2. On July 24, 2017, Gipson filed suit against HPT, Tony Wojciechowski (Human Resources Director), Ted Arkuszeski (Plant Manager), and Clayton Payne (Winding Department Senior Supervisor) in the District Court for the Middle District of Alabama. Gipson alleged race

[1] The Board's General Counsel has recognized that primary jurisdiction in overlapping cases (where the allegations could fall under two agencies) should lie with the original Agency – here, the EEOC – one purpose being to "obviate duplicate litigation." *See generally Memorandum of Understanding Between OSHA and NLRB*, 40 FR 26083 (June 20, 1975) (allegations involving discrimination against employees engaged in health and safety activity lies with OSHA, even where such alleged discrimination might also be proscribed under the NLRA). On that basis "the General Counsel will, absent withdrawal of [a charge that overlaps with an EEOC Complaint], defer or dismiss the charge." *Id*. The EEOC proceedings have been dismissed, and there are pending federal district court proceedings concerning the same events and claims at issue in this NLRB proceeding.

discrimination, harassment, and retaliation under Title VII and 42 U.S.C. §1981, along with state law claims. *See* Gipson Complaints, attached as Exhibit 2.

3. While his first federal employment lawsuit was pending, Gipson filed three more EEOC Charges against HPT on June 27, 2018, October 18, 2018, and April 12, 2019. Each charge alleged claims of race discrimination and retaliation under Title VII. *See* Exhibit 1, pp. 11-56.

4. Gipson filed his first NLRB Charge against HPT with the Board on November 7, 2018. Notably, at the time he filed his first NLRB Charge, Gipson had already filed four EEOC Charges and one federal lawsuit against HPT. In his first NLRB Charge, Gipson alleged that during the litigation of his federal employment discrimination lawsuit, "HPT and its management have interfered with employees, Ashlee Smith [Dismukes], Robert Phifer and others who testified on [Gipson's] behalf . . . by writing them up, suspending them, or terminating their employment." *Id.* [2]

5. On March 28, 2019, *before* the Consolidated Complaint was issued in this matter, Gipson filed a second lawsuit against HPT in the District Court for the Middle District of Alabama, again alleging race discrimination, harassment, and retaliation pursuant to Title VII and § 1981. *See* Exhibit 2, pp. 42-115. The parties are currently conducting discovery in the second Gipson lawsuit. In fact, several of the likely witnesses in this NLRB proceeding will be deposed in the coming weeks.

6. Charging Party Ashlee Smith Dismukes ("Dismukes") filed her first EEOC Charge on June 15, 2018 and her second EEOC Charge on November 4, 2018. In her EEOC Charges,

[2] On February 27, 2019, Regional Director M. Kathleen McKinney notified counsel for HPT that it withdrew the allegations in the charge concerning Robert Phifer.

Dimsukes alleged she was suspended and terminated in violation of Title VII after she testified in Gipson's first lawsuit against HPT. *See* Dismukes EEOC Charges, attached as Exhibit 3.

7. Dismukes then filed her first NLRB Charge against HPT on November 26, 2018, with the allegations arising out of the exact same facts alleged in her two EEOC Charges. In her first NLRB Charge, Dismukes alleged that "[s]ince on or about May 11, 2018, [HPT] has discriminated against [Dismukes] by suspending her in retaliation for and to discourage her protected concerted activities." *Id.* On December 17, 2018, Dismukes filed a First Amended Charge, adding allegations of wrongful termination. As with her EEOC Charges, Dismukes' underlying alleged protected activity is her testimony in Gipson's individual employment lawsuit.

8. On August 30, 2019, with multiple EEOC Charges and two federal employment discrimination lawsuit pending, the Board issued an Order further Consolidating Cases, Second Consolidated Complaint, and Notice of Hearing. The only adverse actions alleged in the Second Consolidated Complaint are: (1) Gipson's termination on or about March 28, 2019; (2) Dismukes' suspension on or about May 11, 2018;[3] and (3) Dismukes' termination on or about August 15, 2018.[4]

9. On November 25, 2019, Dismukes filed suit against HPT in the District Court for the Middle District of Alabama alleging retaliation under Title VII and 42 U.S.C. §1981. The parties are currently conducting discovery in Dismukes' suit.

10. This matter is currently scheduled for hearing on March 15, 2021.

[3] As set forth in HPT's Motion for Partial Summary Judgment, Dismukes' suspension claim is untimely.

[4] Dismukes' termination was effective May 11, 2018, but it is alleged notice of her termination was issued on or about August 15, 2018.

11. Despite prior representations that the hearing on this matter would be limited to only the adverse actions *timely* alleged by Charging Parties, General Counsel's subpoena to HPT requests **44 overly broad categories** of documents, many of them having nothing to do with the *timely* alleged adverse actions.[5] Instead, the documents and information are directed towards the gravamen of Charging Parties' employment law claims. For example, one document request in the subpoena seeks *all* documents HPT produced in the employment action *William Gipson v. Hyundai Power Transformers, USA, Inc., et al.*, 2:17-cv-498-MHT, which totals over 1,100 documents. This does not include the documents requested in the other 43 categories in the Subpoena. Moreover, this request, among others, evidences that this proceeding improperly overlaps with and duplicates the claims already at issue in Gipson and Dismukes' currently-pending federal lawsuits. These requests alone are evidence of the Charging Parties' improper purpose in filing this proceeding.

III. ARGUMENT

A. The Acts Alleged in the Second Consolidated Complaint Are Not Covered by the NLRA.

The crux of the Charging Parties' disputes with HPT in the instant action are based in Title VII and § 1981. They are not proper complaints before the Board. The United States Supreme Court's holding in *Epic Systems Corp. v. Lewis* provides guidance in this matter. In *Epic Systems*, the Supreme Court addressed the issue of whether the right of workers to engage in protected activities pursuant to Section 7 of the NLRA displaced the Federal Arbitration Act ("FAA"), so as to bar class and collective action waivers. 138 S.Ct. 1612, 1616-17 (2018). The Supreme Court held that Section 7 of the NLRA does not displace the FAA and it, therefore, does

[5] HPT filed a Petition to Revoke General Counsel's Subpoena, which was in large part denied.

not bar class and collective action waivers. *Id.* In reaching this conclusion, the Supreme Court analyzed the scope of the definition of "concerted activities" within the meaning of Section 7. *Id.* Specifically, the Court addressed the scope of Section 7's language that guarantees the employees the "right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* (quoting 29 U.S.C. § 157). The Supreme Court noted that "§ 7 focuses on the right to organize unions and bargain collectively," and "[i]t does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Act." *Id.* at 1617. The Supreme Court reasoned, in part, that the NLRA was adopted in 1935, before the FAA was adopted, and therefore, "[i]t is unlikely that Congress wished to confer a right to class or collective actions in § 7, since those procedures were hardly known when the NLRA was adopted." *Id.* The Supreme Court further noted:

> Because the catchall term 'other concerted activities for the purpose of ... other mutual aid or protection' appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, *i.e.*, things employees do for themselves in the course of exercising their right to free association in the workplace.

Id.

Applying this same rationale in *Epic Systems* leads to the unavoidable conclusion that Section 7's language protecting "other concerted activities for the purpose of . . . other mutual aid or protection" does not encompass the alleged protected conduct in this action. As alleged in the Second Consolidated Complaint, both Charging Parties Gipson and Dismukes allegedly engaged in protected conduct under the NLRA by engaging in activity protected by Title VII. As the Supreme Court explained in *Epic Systems*, the list of activities preceding the language in Section 7 stating "other concerted activities for the purpose of . . . other mutual aid or protection," *must* be read in context with the preceding list of activities. *See id.* The preceding list of activities in

Section 7 makes no mention of the right to complain about discrimination, harassment, or any other conduct unlawful under Title VII, particularly where, as here, the alleged complaint is made on behalf of a single individual. Therefore, the language in Section 7 stating "other concerted activities for the purpose of . . . other mutual aid or protection," cannot be read to cover the same conduct covered by Title VII. Moreover, as with the FAA, Title VII was adopted after the NLRA, and it therefore, was unlikely that Congress intended for Section 7 to encompass the same conduct covered by Title VII. *See id.* Indeed, many courts have recognized that, "Congress has manifested an intent that the NLRA not preempt Title VII and other federal laws with respect to discrimination." *Figueroa v. Foster*, 864 F.3d 222, 233 (2d Cir. 2017); *see also Vance v. Ball State Univ.*, 570 U.S. 421, 435 n. 7 (2013) (noting the NLRA's "unique purpose . . . is to preserve the balance of power between labor and management," and "that purpose is inapposite in the context of Title VII, which focuses on eradicating discrimination."); *Kapchus v. Am. Cap Co., LLC*, 2020 WL 1929245, at *3 (W.D. Pa. Apr. 21, 2020) ("Although the NLRA preempts state laws, it does not preempt other federal laws, such as Title VII.").

The Second Consolidated Complaint and the Subpoena issued by General Counsel make clear that the information sought encompasses conduct covered by Title VII, not the NLRA. The only alleged protected activities in which Gipson engaged are his individual employment lawsuits and individual EEOC Charges brought to remedy alleged race discrimination pursuant to Title VII and § 1981. There is no allegation that Gipson pursued claims or allegations on behalf of others or for *mutual* aid and protection. Similarly, Dismukes' only alleged protected activity is providing deposition testimony about Gipson's individual *employment* discrimination lawsuit. She does not pursue claims or allegations on behalf of a group of employees. Instead, the only adverse actions alleged are her own suspension and termination. None of the allegations in relation to Charging

Parties have anything to do with the Charging Parties allegedly exercising their right to free association in the workplace. *See Epic Systems,* 138 S.Ct. at 1617.

The Subpoena itself confirms the conclusion that the allegations in this matter are not encompassed by the rights protected in Section 7 of the NLRA. For example, the Subpoena seeks *all* documents Respondent previously produced in Charging Parties' federal employment lawsuit an *all* documents produced by Respondent to the EEOC in response to Charging Parties' EEOC charges. The Subpoena also seeks documents related to all of Charging Parties' alleged complaints to Respondent about race discrimination. None of these documents have anything to do with Charging Parties exercising their right to free association in the workplace.

Based on the foregoing, the allegations in the Second Consolidated Complaint and the Subpoena clearly show that this proceeding is not properly before the Board. The underlying allegations in this matter fall within the purview of Title VII and there is no indication through the clear language of the statute or otherwise that Congress intended the NLRA, which makes no mention of race discrimination, to cover the complaints of race discrimination alleged in this matter. This matter is, therefore, due to be dismissed.

B. <u>Alternatively, the Board Should Defer to the Jurisdiction of the District Court for the Middle District of Alabama.</u>

Even if this matter was properly before the Board, which it is not, primary jurisdiction of this matter lies with the District Court for the Middle District of Alabama. The Board's General Counsel has recognized that duplicate litigation should be avoided and primary jurisdiction in overlapping cases (where the allegations could fall under two agencies) should lie with the original Agency – here, the EEOC and the District Court for the Middle District of Alabama. *See generally Memorandum of Understanding Between OSHA and NLRB,* 40 FR 26083 (June 20, 1975) (allegations involving discrimination against employees engaged in health

and safety activity lies with OSHA, even where such alleged discrimination might also be proscribed under the NLRA). On that basis, "the General Counsel will, absent withdrawal of [a charge that overlaps with an EEOC Complaint], defer or dismiss the charge." *Id.*

Both the EEOC and the District Court of the Middle District of Alabama had jurisdiction over the allegations in this matter before the Board. Gipson has filed *five* EEOC Charges of Discrimination against HPT, alleging race discrimination, race harassment, and retaliation. Each of those EEOC Charges are now the subject of two separate lawsuits filed by Gipson in the District Court for the Middle District of Alabama, also alleging race discrimination, race harassment, and retaliation. Gipson brought the EEOC Charges and his two lawsuit on his own behalf. The District Court for the Middle District of Alabama consolidated Gipson's two lawsuits. While discovery has been completed in the *first* lawsuit filed by Gipson, the parties are in the midst of conducting discovery in Gipson's second lawsuit.

When the District Court consolidated Gipson's two lawsuits, it recognized that the claims in both actions were intertwined and that it would be virtually impossible to hold a trial on the claims in the first lawsuit without getting into issues raised in the second lawsuit, for which the parties had not yet completed discovery. The District Court further acknowledged that under binding Eleventh Circuit law, particularly a recent ruling from the Eleventh Circuit Court of Appeals,[6] any judgment issued in Gipson's first lawsuit could have a preclusive effect on facts, claims, or defenses in the second lawsuit – facts, claims, and defenses for which the parties have not yet had an opportunity to complete discovery.[7] As such, the District Court concluded it was

[6] *See Shannon v. National Railroad Passenger Corporation*, 780 Fed. Appx. 777 (11th Cir. 2019); *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004).

[7] The same is true for Dismukes' lawsuit pending in the Middle District of Alabama.

fair and just for *all* parties, including Gipson, that the lawsuits be consolidated and that the claims alleged in the first lawsuit be stayed while the parties complete discovery on the claims in the second lawsuit. Gipson himself recognized the potential preclusive effect of a judgment in his first case and did not oppose consolidation.

Similarly, Charging Party Dismukes filed EEOC charges and litigation in the Middle District of Alabama. Dismukes' action in the Middle District is on going, and the parties are engaging in discovery. Written discovery has been conducted, but no depositions have been taken. For the same reasons the *Gipson* Court recognized that there is a potential preclusive effect of multiple, simultaneous actions proceeding on parallel tracks, involving the same parties, same events, same allegations, and same claims, this threat also exists with regard to Dismukes' claims simultaneously proceeding before the NLRB and in District Court.[8]

As the Board is aware, there is virtually no discovery allowed in proceedings pursuant to the NLRA, particularly when compared with the substantive and procedural discovery rights pursuant to the Federal Rules of Civil Procedure. Thus, should the Second Amended Complaint proceed to a hearing and determination – without the same discovery, motion and appeal rights allowed by the Federal Rules of Civil Procedure – then there is a substantial threat of the parties' being deprived of their federal rights available with regard to the pending employment claims. Additionally, there is a substantial threat of inconsistent judgments, should the NLRB and the District Court rule inconsistently on the very same factual allegations and claims.

[8] HPT does not concede that any ruling in this matter will have preclusive effect on issues pending before the District Court of the Middle District of Alabama. Rather, HPT notes that under current Eleventh Circuit precedent, a court may potentially hold there is a preclusive effect, depending on the particular facts and circumstances of the ruling at issue.

This proceeding before the Board now threatens to undermine and effectively nullify the actions and decisions of the District Court that were intended to protect the rights of *all* parties in that action. As discussed above, he Subpoena seeks documents from HPT that concern the Charging Parties' pending Title VII and § 1981 claims pending before the District Court. Moreover, legal counsel for the Charging Parties in this action are *the same legal counsel* as counsel for the Charging Parties in the District Court.[9] Thus, to the extent they are allowed to participate in the hearing currently set for March 15, 2021, there is a substantial threat and likelihood that they will venture into the same claims pending in the District Court. Indeed, the same facts are at issue and the same essential claims, and they are inextricably intertwined.

Accordingly, moving forward with this NLRB proceeding and hearing on March 15, 2021 will cause irreparable harm and prejudice to HPT, deny HPT its rights to discovery and other protections pursuant to the Federal Rules, as well as undermine the pending actions in District Court and create the threat of inconsistent judgments. This proceeding before the Board threatens to preempt application of Title VII and § 1981. The Board should, therefore, in interest of justice and the parties' procedural and substantive rights pursuant to federal law, defer jurisdiction of this matter to the District Court for the Middle District of Alabama.

IV. CONCLUSION

Based on the foregoing, the Second Consolidated Complaint is due to be dismissed because Charging Parties did not engage in protected concerted activity under § 7 of the NLRA. Alternatively, the Board should defer jurisdiction to the District Court for the Middle District of Alabama, and stay this matter until the parties have had the opportunity to fully and fairly litigate Charging Parties' Title VII and § 1981 claims in the District Court for the Middle District of

[9] Legal counsel for HPT is the same in both this proceeding and the District Court, as well.

Alabama. If there are any matters remaining after conclusion of the District Court actions, they may be heard in this forum at that time.

Respectfully submitted,

/s/ Jennifer M. Busby
Jennifer ("Ginger") M. Busby
Elizabeth B. Shirley

ATTORNEYS FOR RESPONDENT
HYUNDAI POWER TRANSFORMERS USA, INC.

OF COUNSEL:
BURR & FORMAN LLP
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed with the NLRB and sent to the following via e-mail, on this the 15th day of February, 2021:

M. Kathleen McKinney
(email: m.kathleen.mckinney@nlrb.gov)
Regional Director
National Labor Relations Board, Region 15
600 Maestri Pl., 7th Floor
New Orleans, LA 70130-3413

William Hearn
(email: William.Hearne@nlrb.gov)
Counsel for the General Counsel
National Labor Relations Board
Subregion 26
80 Monroe Ave., Ste. 350
Memphis, TN 38103

Heather Leonard
(email: Heather@HeatherLeonardPC.com)
P.O. Box 47368
2105 Deveraux Cir., Ste. 111
Birmingham, AL 35243-0768

Cynthia Wilkinson
(email: cwilkinson@wilkinsonfirm.net)
Wilkinson Law Firm, PC
215 N. Richard Arrington Jr. Blvd., Ste 301
Birmingham, AL 35205

Alicia Haynes
(email: akhaynes@haynes-haynes.com)
Haynes & Haynes, P.C.
1600 Woodmere Drive
Birmingham, AL 35226

/s/ Jennifer M. Busby
OF COUNSEL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

HYUNDAI POWER TRANSFORMERS USA, INC.	*	
and	*	Cases 15-CA-230678 15-CA-240476
WILLIAM GIPSON, an Individual	*	
and	*	15-CA-231673
ASHLEE DISMUKES, an Individual	*	

ORDER FURTHER CONSOLIDATING CASES, SECOND CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

On March 28, 2019, a Consolidated Complaint and Notice of Hearing issued in Cases 15-CA-230678 and 15-CA-231673, alleging that HYUNDAI POWER TRANSFORMERS USA, INC., (Respondent) had engaged in in unfair labor practices that violate the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq. Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT those cases are further consolidated with Case 15-CA-240476, filed by William Gipson, an Individual (Gipson), which alleges that Respondent has engaged in further unfair labor practices within the meaning of the Act.

This Second Consolidated Complaint and Notice of Hearing, issued pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, is based on these consolidated cases and alleges that Respondent has violated the Act as described below.

Exhibit B

1. The charges in the above cases were filed by the respective Charging Parties, as set forth in the following table, and served upon Respondent on the dates indicated by U.S. mail:

Case No.	***Amendment***	***Charging Party***	***Date Filed***	***Date Served***
15-CA-230678		Gipson	November 7, 2018	November 8, 2018
15-CA-231673		Dismukes	November 26, 2018	November 28, 2018
15-CA-231673	First Amended	Dismukes	December 17, 2018	December 19, 2018
15-CA-240476		Gipson	April 29, 2019	April 30, 2019
15-CA-240476	First Amended	Gipson	July 9, 2019	July 10, 2019

2. At all material times, Respondent has been a corporation with an office and place of business in Montgomery, Alabama (Respondent's facility), and has been engaged in the manufacture and the nonretail sale of power transformers.

3(a) Annually, Respondent, in conducting its operations described above in paragraph 2, sold and shipped from its Montgomery, Alabama facility goods valued in excess of $50,000 directly to points outside the State of Alabama.

(b) Annually, Respondent, in conducting its operations described above in paragraph 2, purchased and received at its Montgomery, Alabama facility goods valued in excess of $50,000 directly from points outside the State of Alabama.

4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Ted Arkuszeski	-	Senior Production Manager
Henry Kim	-	Human Resources Manager
Tony Wojciechowski	-	Director of Human Resources
Sun Chai Yoon	-	Assistant Production Manager

6(a) About May 10, 2018, Respondent's employee Ashlee Dismukes (Dismukes) engaged in concerted activities with other employees for the purposes of mutual aid and protection, by giving testimony on behalf of employees who filed charges with the Equal Employment Opportunity Commission related to their employment relationship.

(b) About May 11, 2018, Respondent suspended Dismukes.

(c) About August 15, 2018, Respondent terminated Dismukes.

(d) Respondent engaged in the conduct described above in paragraphs 6(b) and (c), because Smith engaged in the conduct described above in paragraph 6(a) and to discourage employees from engaging in these or other concerted activities.

7(a) Throughout 2018, more exact dates currently unknown to the General Counsel, Respondent’s employee Gipson concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent’s employees by complaining about racial discrimination in the workplace related to forced overtime and promotions.

(b) Since about December 7, 2016 and continuing, Respondent’s employee Gipson engaged in concerted activities with other employees for the purposes of mutual aid and protection by filing a charge against Respondent with the Equal Employment Opportunity Commission.

(c) About July 24, 2017, Respondent's employee Gipson engaged in concerted activities with other employees for the purposes of mutual aid and protection by filing a lawsuit against Respondent asserting a statutory right growing out of the employment relationship under the Civil Rights Act of 1964.

(d) About January 15, 2019, Respondent gave Gipson an unsatisfactory performance evaluation.

(e) About March 28, 2019, Respondent discharged Gipson.

(f) Respondent engaged in the conduct described above in paragraphs 7(d) and (e), because Gipson engaged in the conduct described above in paragraphs 7(a), (b), and (c), and to discourage employees from engaging in these or other concerted activities.

(g) Respondent engaged in the conduct described above in paragraphs 7(d) and (e) because Gipson filed a charge in Case 15-CA-230678.

8. By the conduct described above in paragraphs 6(b), (c), and (d), and 7(d), (e), and (f), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

9. By the conduct described above in paragraphs 7(d), (e), and (g), Respondent has been discriminating against employees for filing charges or giving testimony under the Act in violation of Section 8(a)(1) and (4) of the Act.

10. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the second consolidated complaint. The answer must

be **received by this office on or before September 13, 2019, or postmarked on or before September 12, 2019**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the second consolidated complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **November 18, 2019**, **at 10:00 a.m**. **in Conference Room, United States Federal Courthouse, United States Bankruptcy Court, Middle District of Alabama, One Church Street, Montgomery, Alabama**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this second consolidated complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: August 30, 2019

/s/

M. KATHLEEN McKINNEY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 15
600 S. MAESTRI PL., 7TH FLOOR
NEW ORLEANS, LA 70130-3413

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

HYUNDAI POWER TRANSFORMERS
USA, INC.

and Cases 15-CA-230678
15-CA-240476

WILLIAM GIPSON, an Individual

and 15-CA-231673

ASHLEE DISMUKES, an Individual

AFFIDAVIT OF SERVICE OF: Copy of Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing with forms NLRB-4338, Important Notice, and NLRB-4668 attached, dated August 30, 2019.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on August 30, 2019, I served the above-entitled document(s) by **certified or first class mail,** as noted below, upon the following persons, addressed to them at the following addresses:

Tony Wojciechowski Human Resources Representative Hyundai Power Transformers 215 Folmar Pkwy Montgomery, AL 36105-5513	**CERTIFIED MAIL, RETURN RECEIPT REQUESTED**
Marcel L. Debruge Esq. Burr & Forman LLP 420 North 20th St Ste 3400 Birmingham, AL 35203-3284	**FIRST CLASS MAIL**
Meryl L. Cowan Esq. Burr & Forman LLP 420 North 20th St Suite 3400 Birmingham, AL 35203-5201	**FIRST CLASS MAIL**
Ingu Hwang Burr & Forman LLP 420 North 20th St Ste 3400 Birmingham, AL 35203-3284	**FIRST CLASS MAIL**
Kathryn M. Willis Burr & Forman, LLP 11 North Water Street, Suite 22200 Mobile, AL 36602	**FIRST CLASS MAIL**

William Gipson
11695 Steiner Store Road
Fort Deposit, AL 36032

CERTIFIED MAIL

Ashlee Dismukes
1609 Dominick Rd
Prattville, AL 36067-6991

CERTIFIED MAIL

Alicia K. Haynes, Esq.
Haynes & Haynes, P.C.
1600 Woodmere Drive
Birmingham, AL 35226

FIRST CLASS MAIL

Heather N. Leonard, Esq.
PO Box 43768 2105 Devereaux Cir Ste 111
Birmingham, AL 35243-0768

FIRST CLASS MAIL

Cynthia Wilkinson, Esquire
Wilkinson Law Firm PC
215 North Richard Arrington, Jr. Blvd.
Suite 301
Birmingham, AL 35203

FIRST CLASS MAIL

August 30, 2019
Date

Gail Fields, Designated Agent of NLRB
Name

/s/
Signature

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Cases 15-CA-230678
15-CA-240476
15-CA-231673

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Tony Wojciechowski
Human Resources Representative
Hyundai Power Transformers
215 Folmar Pkwy
Montgomery, AL 36105-5513

Marcel L. Debruge Esq.
Burr & Forman LLP
420 North 20th St Ste 3400
Birmingham, AL 35203-3284

Meryl L. Cowan Esq.
Burr & Forman LLP
420 North 20th St Suite 3400
Birmingham, AL 35203-5201

Ingu Hwang
Burr & Forman LLP
420 North 20th St Ste 3400
Birmingham, AL 35203-3284

Kathryn M. Willis
Burr & Forman, LLP
11 North Water Street, Suite 22200
Mobile, AL 36602

William Gipson
11695 Steiner Store Road
Fort Deposit, AL 36032

Ashlee Dismukes
1609 Dominick Rd
Prattville, AL 36067-6991

Heather N. Leonard, Esq.
PO Box 43768
2105 Devereaux Cir
Ste 111
Birmingham, AL 352430768

Cynthia Wilkinson, Esquire
Wilkinson Law Firm PC
215 North Richard Arrington Jr. Blvd.
Suite 301
Birmingham, AL 35203

Alicia K. Haynes, Esq.
Haynes & Haynes, P.C.
1600 Woodmere Drive
Birmingham, AL 35226